

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0563, Pool Environments, Inc. v. Peter Holden, the court on February 24, 2006, issued the following order:

The defendant, Peter Holden, appeals from a judgment of the superior court entered for the plaintiff, Pool Environments, Inc. In addition to arguing that the verdict is unsupported by the evidence, he contends that the trial court erred when it: (1) denied his motion to dismiss the plaintiff's request for attorney's fees; (2) declined to set aside or reduce the jury's \$80,164.98 verdict; and (3) declined to set aside the jury's verdict on his counterclaim. We affirm.

The defendant first argues that the trial court erred in denying, at the close of the plaintiff's evidence, his motion to dismiss the plaintiff's request for attorney's fees. In their agreed statement of the case, the parties indicated that they had reached an agreement in early 2000 in which the plaintiff agreed to provide and install a climate control system in the defendant's pool house and the defendant agreed to pay \$44,045 for the system. The defendant did not sign the contract provided by the plaintiff. The jury was instructed to determine the terms of the parties' contract. At trial, the defendant admitted that the three-page January 24, 2000 contract reflected the terms of the parties' oral contract. That contract contained the following language: "Cost of collection if necessary will be added to the unpaid balance as an additional cost of the contract." The plaintiff argued at trial that his attorney's fees were included in his cost of collection and testified that his fees at the close of trial would approximate \$40,000. Given the evidence presented, we find no error in the trial court's ruling. See Leavitt v. Hamelin, 126 N.H. 670 (1985) (construing statutory language "all reasonable costs of collection" to include attorney's fees).

The defendant also argues that the trial court erred in denying his motion to set aside or reduce the jury's \$80,164.98 ruling. The parties do not disagree that the award included \$40,000 in attorney's fees. Having concluded that the evidence could support the jury's award of \$40,000 in attorney's fees to the plaintiff, we turn to whether the jury award of \$40,164.98 was supported by the evidence. "Direct review of a damages award is the responsibility of the trial judge, who may disturb a verdict as excessive (or inadequate) if its amount is conclusively against the weight of the evidence and if the verdict is manifestly exorbitant." Bennett v. Lembo, 145 N.H. 276, 281-82 (2000) (quotations omitted). In this case, the plaintiff admitted that he had not fully completed the work under the contract because he had not been paid. Evidence was also presented that he had lost \$40,164.98 on the job. Because there is evidence in the record to support the jury award, we find no error in the trial court's ruling. See *id.* at 282 ("Our task on review is not to attempt to ascertain or divine the one and only correct verdict.").

The defendant also argues on appeal that the award was based on a theory of restitution although that issue was not before the jury. The trial court instructed the jury that the purpose of the damage award was "to put the plaintiff

in the same position he would have been in if the defendant had fully performed under the contract” and “to compare the position of the plaintiff as a result of the defendant’s violation of the agreement to the position the plaintiff would have been in had the defendant fully performed his promises.” The defendant did not object to these instructions. As we have previously stated, there was evidence in the record to support the jury’s award, particularly in light of the plaintiff’s admission that he had not completed all of the work under the contract and therefore presumably not incurred all of the costs contemplated.

The defendant also contends that the trial court erred in denying his motion to set aside the verdict on his counterclaim because it was against the clear weight of the evidence. Conclusively against the weight of the evidence means that the verdict was one that no reasonable jury could return. See Babb v. Clark, 150 N.H. 98, 100 (2003). Unless the decision was made without evidence, we will uphold the trial court’s decision on a motion to set aside the verdict. *Id.* In this case, the plaintiff testified that he observed no evidence of damage in the defendant’s pool building in September 2002 and that the defendant had not mentioned mold in the conversation that prompted the plaintiff’s visit. Because there was evidence to support the jury’s verdict, we find no error in the trial court’s ruling. See State v. Giles, 140 N.H. 714, 718-19 (1996) (jury may accept or reject testimony in whole or in part; we will defer to its findings on appeal).

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**